STATE OF MICHIGAN

COURT OF APPEALS

URSULA ST. CLAIR, Personal Representative of the Estate of LAYLA DIETZ,

Plaintiff-Appellant,

v

BAYVIEW YACHT CLUB,

Defendant-Appellee,

and

WILLIAM CARLETON, II,

Defendant.

UNPUBLISHED
April 21, 2011

No. 296533
Wayne Circuit Court
LC No. 08-102438-NO

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting summary disposition in favor of defendant Bayview Yacht Club (Bayview).[1] We affirm.

I

Bayview is a yacht club located on the Detroit River in the City of Detroit. Between September 21, 2007, and September 23, 2007, Bayview hosted a sailing tournament. On the evening of September 22, 2007, a private party was held at Bayview for Bayview's members, their guests, and the tournament participants. Defendant William Carleton, II (Carleton) was one of the participants in the sailing tournament and was present at the party.

Plaintiff's decedent, Layla Dietz (Dietz), was invited to the party as well. Dietz and Carleton became acquainted at the party and Carleton began buying alcoholic drinks for Dietz.

[1] Defendant William Carleton, II, is not a party to this appeal.

According to plaintiff, Dietz consumed alcohol at the party "and as a result thereof was having difficulty with her balance and other physical and mental activities." Also according to plaintiff, Dietz "stumbled inside the bar and exhibited other alcohol-related difficulties with her balance, and was requested by the agents of Bayview Yacht Club to leave the bar." Carleton agreed to assist Dietz and take her out of the bar. Carleton testified that he and Dietz left the bar at about 12:30 a.m.

The bartenders working at Bayview that night testified that they had begun serving Dietz mixed drinks at approximately 10:00 p.m., and that Dietz was visibly intoxicated by sometime after 11:00 p.m. Therefore, the bartenders stopped serving her alcohol. One of the bartenders testified that Dietz had begun to show signs of intoxication, such as slurred speech. Another bartender and an unrelated witness recalled that Dietz had stumbled and fallen in the bar that evening and that Carleton had helped her up. Dietz's sister, Tanya Neumann, was also present at the party on the evening of September 22, 2007. Neumann testified that her sister left the bar with Carleton at about 12:15 a.m.

Carleton's boat, the *Tiburon*, was docked in Bayview's marina on the evening of September 22, 2007, and was tied to a rigid inflatable boat. Tied up near the *Tiburon* and the rigid inflatable boat was a third boat, the *Cujo*. Carleton testified that, after leaving the bar, Dietz wanted to see his boat and he therefore took her to see it. In order to get onto Carleton's boat, it was necessary to first climb down the dock and then onto the rigid inflatable boat. It is undisputed that at some point prior to 2:00 a.m., Carleton and Dietz engaged in sexual activities aboard the rigid inflatable boat.

A woman who was walking to the *Cujo* discovered Carleton and Dietz having sex. According to Carleton, Dietz was embarrassed about having been discovered and asked him to leave. Carleton stated that he left the area at about 2:00 a.m., leaving Dietz alone on the rigid inflatable boat. Carleton testified that as he was walking back to his vehicle, which was parked on the Bayview grounds, he could see that Dietz was still on board the rigid inflatable boat.

On September 23, 2007, Dietz was reported missing by her sister. Two or three days later, the body of a young woman was found in the water near Bayview's marina. The young woman was identified as Dietz. The Wayne County Medical Examiner's Office determined that the cause of death was drowning, and found elevated levels of alcohol in the decedent's blood and urine. Other than small abrasions on the decedent's knees and an abrasion on her left temple, the medical examiner discovered "no significant evidence of trauma or injury." The medical examiner noted in the autopsy report that it was "not possible . . . to ascertain how the decedent got into the water."

Plaintiff, as the personal representative of Dietz's estate, sued Carleton and Bayview for negligence in the Wayne Circuit Court.[2] Plaintiff alleged that Bayview had been negligent in its

[2] Plaintiff also sued Bayview under Michigan's dramshop act, MCL 436.1801 *et seq*. However, plaintiff's dramshop act claims have been dismissed and are not at issue in this appeal.

maintenance of the marina area and surrounding premises, and that Bayview had breached its duty to Dietz by failing to maintain or install adequate lighting, ladders, buoys, and railings on and near the docks. Carleton ultimately settled with plaintiff, and only the negligence claim against Bayview went forward.

Bayview moved for summary disposition pursuant to MCR 2.116(C)(10), arguing among other things that there was no genuine issue of material fact concerning whether it had caused Dietz's death. Bayview pointed out that there was no evidence whatsoever concerning the manner or means by which Dietz had entered the water and asserted that it was therefore mere conjecture for plaintiff to speculate that its lighting, ladders, buoys, railings, or maintenance of the docks had caused Dietz to fall. Bayview also asserted that Dietz had been drinking heavily, that her death was more likely than not attributable to her own intoxication, and that plaintiff's negligence claim was therefore barred by MCL 600.2955a. The circuit court granted Bayview's motion for summary disposition, concluding on the basis of the evidence presented that no rational trier of fact could conclude that Bayview's acts or omissions had been the cause of Dietz's drowning death.

II

We review de novo the circuit court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is properly granted under MCR 2.116(C)(10) when the documentary evidence shows that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007).

III

We conclude that the circuit court properly granted summary disposition in favor of Bayview with respect to plaintiff's negligence claim. "To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "[C]ausation is comprised of two separate elements: (1) cause in fact, and (2) legal, or proximate, cause." *Id*. at 6 n 6. "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). "On the other hand, legal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Id*. "Liability for negligence does not attach unless the plaintiff establishes that the injury in question was proximately caused by the defendant's negligence." *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). "Proximate cause means such cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Id*. The determination of proximate cause is generally a question for the trier of fact; however, if reasonable minds could not differ regarding the proximate cause of a plaintiff's injury, the court should decide the issue on summary disposition as a matter of law. *Babula*, 212 Mich App at 54.

Negligence is never presumed and the mere happening of an accident, or proof of resulting injury, is not sufficient to establish negligent conduct. *Daigneau v Young*, 349 Mich 632, 636; 85 NW2d 88 (1957); *Michigan Aero Club v Shelley*, 283 Mich 401, 410; 278 NW 121 (1938). "To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Skinner*, 445 Mich at 164. Speculation and conjecture are insufficient to create a genuine issue of material fact concerning the cause of a plaintiff's injuries. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 140; 666 NW2d 186 (2003); *Mulholland v DEC Int'l Corp*, 432 Mich 395, 416-417 n 18; 443 NW2d 340 (1989). "Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory." *Skinner*, 445 Mich at 164. "'There may be [two] or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any [one] of them, they remain conjectures only.'" *Id*., quoting *Kaminski v Grand Trunk Western R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956). It is fundamental that the trier of fact may not be permitted to guess. *Daigneau*, 349 Mich at 636.

Plaintiff's theory of causation in the present case—i.e., that Bayview failed to maintain its premises in a safe condition and that this caused Dietz to fall into the water from the rigid inflatable boat or the dock—"is, at best, just as possible as another theory." *Skinner*, 445 Mich at 164. Indeed, there was no evidence concerning the manner or means by which Dietz actually entered the water. No admissible evidence tended to establish that Dietz fell into the water from the rigid inflatable boat, while she was attempting to get out of the rigid inflatable boat, from the dock, or from any other part of Bayview's property. The admissible documentary evidence in this case was "without selective application" to any of the possible explanations, and plaintiff's theory of causation therefore remained conjecture only. *Id*. As explained earlier, speculation and conjecture are insufficient to create a question of fact concerning causation. *Mulholland*, 432 Mich at 416-417 n 18. Without any proof of the manner by which Dietz entered the water in the first instance, plaintiff could not tie Bayview's actions to Dietz's ultimate drowning. On the basis of the evidence presented, no rational trier of fact could have concluded that, but for Bayview's allegedly negligent acts or omissions, Dietz would not have drowned. See *Skinner*, 445 Mich at 163.

Moreover, even though the medical examiner suggested in his affidavit that Dietz had likely fallen into the water from the rigid inflatable boat or the dock, it is not clear how the medical examiner formed this opinion. Indeed, the medical examiner noted in the original autopsy report that it was "not possible . . . to ascertain how the decedent got into the water." A conclusory affidavit that is unsupported by specific, factual averments is not sufficient to create a genuine issue of material fact for trial. *Bowerman v Malloy Lithographing, Inc*, 171 Mich App 110, 115-116; 430 NW2d 742 (1988); *Jubenville v West End Cartage, Inc*, 163 Mich App 199, 207; 413 NW2d 705 (1987).

Plaintiff also argues that the circuit court erred by requiring her to establish that Bayview's alleged negligence was *the* proximate cause of Dietz's death rather than simply *a* proximate cause of Dietz's death. We fully acknowledge that there may be more than one proximate cause in a typical negligence case, and a defendant's negligence need not be the sole cause in order for the plaintiff to recover. *O'Neal v St John Hosp & Med Center*, 487 Mich 485, 496-497; 791 NW2d 853 (2010); *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988); *Grof v Michigan*, 126 Mich App 427, 437; 337 NW2d 345 (1983). However,

plaintiff failed to create a genuine issue of material fact concerning whether Bayview's alleged negligence was the factual or "but for" cause of Dietz's death. Therefore, any error in the circuit court's proximate-cause analysis was necessarily harmless. *Skinner*, 445 Mich at 163.

In sum, we note that "causation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary [disposition]." *Skinner*, 445 Mich at 172-173. Because plaintiff presented only conjecture and speculation to support her theory of factual causation in this case, the circuit court properly granted summary disposition in favor of Bayview.

Affirmed. As the prevailing party, defendant Bayview Yacht Club may tax costs pursuant to MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Jane E. Markey